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No. 87-1054

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,
v.
RICHARD BRUCH, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Rather than dealing with the detailed statutory analysis in Firestone's opening brief, respondents ("Bruch") and their amici merely cite a few isolated provisions of ERISA and snippets of history that, when viewed in context, do not support their position. They rely primarily on emotional appeals that affirmance of the decision on review will serve a single statutory "policy"—apparently not recognizing the well-documented fact that ERISA represents a balance between competing policies.

1. On the standard of review question, Bruch first asserts that this issue (which he raised in his complaint and repeatedly thereafter) may not properly be before the Court. If this were true, the Court should vacate the court of appeals' decision, not dismiss the writ of certiorari as Bruch suggests. In

fact, contrary to Bruch's assertion, Firestone was required to and did function as a fiduciary when it made the claims decision. Thus, the standard of review question is squarely presented here.

Bruch and his amici argue that the Court should adopt a de novo standard of judicial review in this case as a matter of federal common law, based on ERISA's authorization of a cause of action for recovery of benefits separate from an action for breach of fiduciary duty. However, a fiduciary's substantive duties specifically include the obligation to abide by the terms of the plan. The fiduciary provisions accordingly may not be ignored in a suit for benefits. Deferential review is required in such a suit because the fiduciary's authority to make claims decisions encompasses the discretion to interpret and apply the plan's eligibility criteria. ERISA's imposition of trust standards on the fiduciary effectively prevents any action based on his self-interest, and judicial deference to his decision accords with pre-ERISA benefits cases involving fiduciary standards.

2. On the "participant" question, Bruch and his amici primarily argue that the term "participant" should be read broadly in light of the intent of ERISA's disclosure provisions. They contend that this expansive interpretation of who is a "participant" will not create an undue burden on plan administrators because ERISA's so-called "automatic" disclosure requirements extend not to all "participants" but only to a subclass of "participants covered under the plan." Neither the language nor the history of the disclosure provisions provides any basis for this contention, and the Department of Labor's regulation defining a "participant covered under the plan" is therefore entitled to no judicial deference.

ARGUMENT

I. DE NOVO REVIEW OF AN EMPLOYER FIDUCIARY'S CLAIMS DECISION UNDER AN UNFUNDED BENEFIT PLAN IS CONTRARY TO THE MANDATE OF ERISA.

A. The Question of the Scope of Review of a Fiduciary's Determination of an Employee Benefits Claim Is Properly Before the Court.

Bruch begins his argument on the standard of review question by suggesting that the writ of certiorari should be dismissed as improvidently granted because Firestone allegedly was not, or did not "purport" to be, a "fiduciary." (Brief for Respondents ("Bruch Brief") at 12-15) Even if these factual allegations were true—which they are not—they would require this Court not to dismiss the writ but to vacate the decision of the court of appeals, which was premised on Firestone's status as a fiduciary.

Bruch's argument is based entirely on the fact that when Firestone made the benefits decision, it was unaware that ERISA applied to termination pay. (*See* Bruch Brief at 13) This fact fails to prove either that Firestone did not believe it was a fiduciary or that Firestone was not a fiduciary.

Indeed, an employer or other person may be a fiduciary even though he does not know that he is subject to ERISA. *See Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd sub nom. Roberts v. Burlington Industries*, 477 U.S. 901 (1986); *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2220-21 & n.10 (1987). A person may even be a fiduciary without knowing that he is subject to any fiduciary standards at all. *See* I A. Scott & W. Fratcher, *Scott on Trusts* ("*Scott on Trusts*") § 17.1 at 226-27; *id.* § 23 at 249-50 (4th ed. 1988).

Firestone's termination pay plan is a trust under the statutory mandate of ERISA. (*See* Brief for Petitioners ("Firestone Brief") at 11-14, 17-19, 22-25) Bruch alleged in his complaint that Firestone was the named fiduciary of the plan (*see* JA95 ¶ 10, JA96 ¶ 13) and argued that Firestone breached its fiduciary duties under ERISA in denying respondents the termination pay that they claim under the terms of the plan (*see* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 97, 98-99). Given this history Bruch can hardly argue in this Court that Firestone was not a fiduciary.

The fact is that Firestone's conduct as the manager of its termination pay plan demonstrates that it was functioning as a fiduciary. Notwithstanding Bruch's assertion to the contrary (*see* Bruch Brief at 14-15), the uncontradicted evidence of record is that the only reason Firestone denied respondents' claim was its conclusion that they were not entitled to termination pay under the terms of the plan. (*See* Deposition of Thomas E. Robinson at 145) The record also shows that Firestone was scrupulous in applying the plan uniformly to past and subsequent plan participants. (*See id.* at 145, 154; JA118-JA121) Thus, Bruch's assertion that Firestone was not acting as a fiduciary lacks any support in the record, and this case does present the question of the scope of review of a fiduciary's benefits decision.

B. ERISA's Legislative Scheme Requires Courts To Review Plan Fiduciaries' Benefits Decisions Deferentially.

1. The enforcement provisions of ERISA do not justify creation of a federal common law to govern suits for benefits that ignores the statute's fiduciary provisions.

Bruch and his amici attempt to evade the statutory analysis of ERISA's fiduciary provisions in Firestone's brief by asserting that an action to recover benefits under the terms of an ERISA plan is governed by a federal common law drawn

not from those provisions but from the "policy" of ERISA to "protect the interests of plan participants and beneficiaries." (Bruch Brief at 23; *see also* Brief for the United States ("DOL Brief") at 9, 20) In fact, as this Court has long recognized, Congress struck a balance in ERISA between the policy identified by Bruch and the counteracting policy of encouraging employers to maintain existing plans and develop new ones. (*See* Firestone Brief at 9, 14) Moreover, any federal common law developed by the courts must be consistent with ERISA's language and structure.

Bruch argues that ERISA's fiduciary provisions are not relevant to suits for benefits because the statute's civil enforcement provision, section 502(a), 29 U.S.C. § 1132(a),

> recognizes that plan administrators are under *two discrete sets* of obligations: the fiduciary duties imposed by the Act itself [enforced under section 502(a)(2), 29 U.S.C. § 1132(a)(2)] and the separate duties imposed by 'the terms of [a] plan' [enforced under section 502(a)(1)(B), *id.* § 1132(a)(1)(B)].

(Bruch Brief at 21 (emphasis in original); *see also* Brief of American Association of Retired Persons ("AARP Brief") at 4-5; Brief for the Pension Rights Center ("PRC Brief") at 4-6) This argument ignores section 404(a)(1)(D) of ERISA, which sets forth a fiduciary's duty to act "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). A fiduciary thus has only *one* set of obligations: the fiduciary duties imposed by ERISA itself "to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985).

In fact, section 502(a) of ERISA does not even purport to define the substantive rights of participants or beneficiaries. The provision (consistent with the heading of Part 5 of the statute, entitled "Administration and Enforcement") merely identifies who may bring civil actions and what relief they

may seek. The relief available under section 502(a)(2) takes the form of personal liability of the fiduciary to the plan as a whole. *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 140-44. Benefits due an individual participant or beneficiary may be obtained only through a suit under section 502(a)(1)(B), which is brought against the plan as an entity. *See Mackey v. Lanier Collections Agency & Service*, 108 S. Ct. 2182, 2187 & n.7 (1988). The existence of two enforcement mechanisms does not create two sets of statutory duties.

Bruch contends that courts are to resolve claims under section 502(a)(1)(B) under a federal common law created by "look[ing] first and foremost to the policies of ERISA, and . . . borrow[ing] state-law rules to the extent such rules will 'effectuate' those policies." (Bruch Brief at 23; *see also* DOL Brief at 9) However, the very case relied upon by Bruch held that a court must first consult the express language of the statute, then the statutory structure or "the penumbra of express statutory mandates," and only as a last resort "the policy of the legislation." *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).[1] It is to ERISA's language

1. The legislative history of ERISA cited by Bruch (*see* Bruch Brief at 22) does not sanction development of a federal common law that ignores the statutory language. The statement in the Conference Report that suits to recover benefits under the plan "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947" (H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107, *and in* 3 *Legislative History* 4277, 4594) merely clarifies that state courts hearing these cases under section 502(e)(1), 29 U.S.C. § 1132(e)(1), are nevertheless to apply federal law and that suits for benefits are removable to federal court. *See Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549, 1557 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). Read in context, Senator Javits' statement that "it is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans" (120 Cong. Rec. 29,942 (1974), *reprinted in* 3 *Legislative History* 4771) is a reference to the fact that Congress preempted state law with respect to all of the areas addressed by ERISA. *See* 29 U.S.C. § 1144(a).

and structure—so consistently avoided by Bruch and his amici—that we now turn.

2. ERISA grants claims authority and discretion to plan fiduciaries.

Bruch urges the Court to adopt as federal common law the rule that a plan fiduciary such as Firestone does not have discretion to make benefits decisions unless the plan document itself grants him such discretion. (Bruch Brief at 27-30)[2] However, there is no basis on which the Court may fashion such a rule because, in Bruch's own words, "[t]here is no doubt that, as Firestone states, in enacting ERISA 'Congress intended benefits decisions to be committed to the authority of fiduciaries. . . .'" (*Id.* at 19; *see* Firestone Brief at 9, 10 & n.6)

In order to circumvent his own acknowledgement of congressional intent, Bruch attempts to draw a distinction between the authority to make benefits decisions and the authority to determine the meaning of the plan. (*See* Bruch Brief at 25) He then asserts that plan fiduciaries have only the former type of authority under either ERISA or trust law. (*See id.* at 29-30, 32-33) His arguments are patently without merit.

A named fiduciary has authority pursuant to sections 402(a)(1) and 503 of ERISA, 29 U.S.C. §§ 1102(a)(1) and 1133, to make all claims decisions.[3] Thus, he necessarily has

2. Because Bruch never made this argument in the district court, Firestone included only the substantive terms of its termination pay plan and a summary thereof in the record. (*See* JA118 ¶¶ 3-4, JA121 ¶ 11) The record nonetheless demonstrates that Firestone had the discretion to interpret the plan and to apply it to specific situations. (*See* JA118 ¶ 3)

3. Contrary to Bruch's assertion (*see* Bruch Brief at 27 n.20; *see also* AARP Brief at 8), section 402(a)(1) is a substantive grant of authority and not merely a disclosure requirement. The provision appears in Part 4 of ERISA (entitled "Fiduciary Responsibility") rather than in Part 1 of ERISA (entitled "Reporting and Disclosure") and states that the named fiduciary "*shall* have the authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1) (emphasis added).

the authority to interpret the eligibility criteria established by the plan and to apply them to the facts at hand. The Department of Labor itself has concluded that such decision-making authority is discretionary by its very nature. *See* 29 C.F.R. § 2509.75-8D-3; 29 U.S.C. § 1002(21)(A).[4]

Moreover, this Court has already held that

> rather than explicitly enumerating *all* of the powers . . . of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority. . . .

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, 472 U.S. 559, 570 (1985) (emphasis in original).[5] Courts applying trust law have readily concluded that a grant of authority to a fiduciary to make claims decisions includes the discretion to interpret the eligibility criteria

4. Even if the amount of discretion vested in a fiduciary were unclear (*see* Bruch Brief at 27 n.20), ERISA would still foreclose the adoption of a de novo standard of review because that standard affords *no* discretion to fiduciaries.

5. In support of its contention that contract rather than trust law should govern this case, the Department of Labor asserts that the drafters of ERISA intended "only selective adoption of trust rules." (DOL Brief at 18) However, the Senate Report relied on by the Department stated that traditional trust law was "insufficient" to protect the interests of plan beneficiaries only to the extent that it permitted "exculpatory clauses" that relieved trustees from liability for breach of fiduciary duty or permitted trustees to make investments that might otherwise be considered imprudent. See S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865 *and in* 1 *Legislative History* 587, 615. Obviously, no such exculpatory clause is at issue in this case. Nor does the Senate Report's statement that courts should "bear[] in mind the special nature and purposes of employee benefit plans" *(id.)* support the Department's position. Similar language appears in the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 501(a), which subjects union representatives to fiduciary standards and requires them to hold money and property for the sole benefit of union members "taking into account the special problems and functions of a labor organization. . . ." Congress intended this provision merely to codify the flexibility already inherent in the common law of trusts. *See* H.R. Rep. No. 741, 86th Cong., 1st Sess. 81 (1959).

and apply them to particular cases. *See, e.g., Miller v. Associated Pension Trusts*, 541 F.2d 726 (8th Cir. 1976); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955); *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954) (cited with approval in legislative history of WPPDA; *see* Firestone Brief at 17); *see also* III *Scott on Trusts* § 187.2 at 33-34; Restatement (Second) of Trusts § 186 Comment d (1959). Even when the trust instrument does not expressly grant any authority to the trustee, courts have concluded that a fiduciary has the inherent discretion to interpret the eligibility criteria set forth in the trust document. *See Fleishman v. Blechman*, 148 Cal. App. 2d 88, 306 P.2d 548 (1957); *Kloman v. Doctors Hospital*, 76 A.2d 782 (D.C. 1950); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858 (1965).[6]

While Bruch correctly notes that "it is ordinarily for the *courts* to determine the meaning of legal documents such as trust instruments" (Bruch Brief at 32 (emphasis in original)), the authority on which he relies states that courts review trust documents only to determine "[t]he extent of the duties and powers of [the] trustee." *See* III *Scott on Trusts* § 201 at 221. Bruch's reliance on *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) (*see* Bruch Brief at 33), as supporting de novo review here is equally misplaced. In *Robinson*, this Court held that plan fiduciaries could not be sued on a claim that the terms of a plan were unreasonable because the terms were set by the collective bargaining agreement, not by the fiduciaries. Notably, the Court cited with approval cases holding that when the fiduciary has "full authority" to determine eligibility requirements, their decisions are subject *only* to a reasonableness requirement. 455 U.S. at 573.

6. *See also Woodward v. Dain*, 109 Me. 581, 85 A. 660 (1913); *Copp v. Worcester County National Bank*, 347 Mass. 548, 199 N.E.2d 200 (1964); *Commonwealth-Merchants Trust Co. v. Seglie*, 127 N.J. Eq. 160, 12 A.2d 153 (Super. Ct. Ch. 1940); *Ireland v. Ireland*, 84 N.Y. 321 (1881). The Solicitor General has previously acknowledged that a trustee's duties include the "exercise of discretion with regard to benefit eligibility and other similar matters" and the "resol[ution of] eligibility questions between the independent trust and the beneficiaries." Brief of the National Labor Relations Board in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (No. 80-289) at 37, 38.

Bruch finally urges that whatever claims discretion other fiduciaries may have, a court should not defer to the decision of an employer fiduciary of an unfunded plan. (Bruch Brief at 25-26; *see also* DOL Brief at 11-12)[7] However, as demonstrated at length in Firestone's opening brief, Congress not only refused to vary the scope of a fiduciary's authority in these circumstances, it also expressly permitted an employer fiduciary of an unfunded plan to exercise full authority with respect to claims decisions despite any potential conflict of interest that arises. (*See* Firestone Brief at 22-27 & n.25)[8] Neither Bruch nor his amici suggest how the Court can legitimately ignore the express language of the statute on these points.

3. A deferential standard of review under ERISA would not provide less protection to employees than prior benefits law.

Bruch argues generally that application of the arbitrary and capricious standard in cases such as this one would result in a "diminution" of employees' benefits rights under ERISA as compared to prior law. (Bruch Brief at 18) In the handful of

7. Four of the five cases that Bruch asserts applied de novo review to unfunded plans (*see* Bruch Brief at 18) involved the question whether the employer could terminate the plan under the terms of a collective bargaining agreement. *See United Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988); *In re White Farm Equipment Co. (Hansen v. White Motor Corp.)*, 788 F.2d 1186 (6th Cir. 1986); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The only case cited by Bruch that considered whether a plan fiduciary correctly interpreted the terms of the plan expressly refused to follow the decision on review here and applied the arbitrary and capricious standard. *See DeGeare v. Alpha Portland Industries*, 837 F.2d 812 (8th Cir. 1988).

8. Bruch simply is incorrect in contending (*see* Bruch Brief at 26) that Firestone "face[d] a conflict of interest to a degree unknown to the historic law of trusts." Common law courts regularly have deferred to the decisions of trustees even when the trustee's decision effectively took money from the beneficiary's pocket and put it in his own. *See, e.g., Raffety v. Parker*, 241 F.2d 594 (8th Cir. 1957); *Lovett v. Peavy*, 253 Ga. 79, 316 S.E.2d 754 (1984); *Svenson v. First National Bank*, 5 Mass. App. Ct. 440, 363 N.E.2d 1129 (1977); *In re Cowen's Estate*, 148 Misc. 35, 265 N.Y.S. 40 (Sur. Ct. 1933).

pre-ERISA contract cases he cites, however, the benefits administrator was not subject to the substantive fiduciary standards imposed by ERISA. Congress chose to adopt trust principles rather than contract principles "precisely because fiduciary standards long established in equity would best protect employee beneficiaries." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981).[9]

To the extent that the Court determines the appropriate standard of review by turning to pre-ERISA law, the pertinent cases are those in which the benefits administrator—like the plan fiduciary under ERISA—was subject to trust-based standards. State law cases imposing such standards on benefits administrators uniformly adopted a deferential standard of review of the administrator's decision. *See, e.g., Reese v. Administrative Committee of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818 (1963); *Kloman v. Doctors Hospital*, 76 A.2d 782 (D.C. 1950); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955); *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954).

Cases decided under section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), conclusively demonstrate that the imposition of trust-based standards requires the adoption of a deferential standard of review. As noted in Firestone's opening brief, section 302(c)(5) applies to benefit plans that are part of an actual contract that has been collectively bargained, as opposed to a theoretical "unilateral contract" that an employee "accepts" by not quitting his job. (*See* Firestone Brief at 13 &

9. Bruch's reliance on Senator Javits' statement that his bill permitted employees to sue for "breach of any contract or trust guaranteeing them any rights" (*see* Bruch Brief at 28 n.21) is wholly misplaced. The Senate bills of which Senator Javits was a sponsor did not apply the fiduciary standards to unfunded plans (*see* Firestone Brief at 24 n.21), did not grant claims authority to fiduciaries (*see id.* at 15-16), and did not preempt state law with respect to claims for benefits (*see* H.R. 2 in the Senate, 93d Cong., 2d Sess. § 699, 120 Cong. Rec. 4977 (1974), *reprinted in* 3 *Legislative History* 3599, 3820-21). By contrast, ERISA imposes trust standards on and grants decision-making authority to all fiduciaries, including those who administer unfunded plans, and preempts state law while directing federal courts to look to the common law of trusts.

n.11) Despite the obvious "contractual" aspects of these plans, courts have uniformly applied the arbitrary and capricious standard of review under section 302(c)(5) because the trustees are subject to trust-based standards, including a "sole benefit" standard nearly identical to that imposed by ERISA.[10] The arbitrary and capricious standard of review is equally applicable to Firestone's termination pay plan, because whether the plan is viewed as a contract or not, it is indisputably subject to ERISA's fiduciary standards.[11]

II. THE NAMED PLAINTIFFS ARE NOT "PARTICIPANTS" WITHIN THE MEANING OF ERISA SIMPLY BY BEING FORMER EMPLOYEES WHO CLAIM TO BE ENTITLED TO BENEFITS.

A. The Expansive Reading of the Term "Participant" Urged by Bruch and His Amici Ignores the Language and Legislative History of ERISA.

Neither Bruch nor his amici cite any basis in ERISA for interpreting the term "participant" to cover a former employee whose only connection to the plan is his claim of entitlement

10. Two of the supposed "significant differences" between section 302(c)(5) of the LMRA and ERISA that AARP asserts make the standard of review developed under the former statute "inappropriate" under the latter (*see* AARP Brief at 11-12) were refuted in Firestone's opening brief (*see* Firestone Brief at 22-25, 28 & n.27). AARP's two other "differences" are no more persuasive than the others. Although the LMRA does not contain a specific jurisdictional provision authorizing civil actions to recover benefits (*see* AARP Brief at 11), courts have regularly assumed jurisdiction of suits for benefits under section 302(c)(5) (*see* Firestone Brief at 13 & n.10). And while section 302(c)(5) trustees were "often" given authority to make rules as well as to apply rules made by others (*see* AARP Brief at 12), courts have reviewed the exercise of both types of authority deferentially because the trustees were subject to fiduciary standards. *See, e.g., Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1977); *Beam v. International Organization of Masters*, 511 F.2d 975 (2d Cir. 1975); *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958); *Bono v. Kramer*, 346 Mass. 355, 191 N.E.2d 760 (1963).

11. As Bruch recognizes (*see* Bruch Brief at 34-35), the arbitrary and capricious standard would also apply even under contract law if Firestone had claims discretion—as is certainly the case (see pp. 7-9, *supra*).

to benefits.[12] The opposing briefs ignore the eligibility criteria in the plan that define who is a "participant" (*see* Firestone Brief at 34, 38-39) and fail to respond to Firestone's critical point: when a court rules in a claimant's favor, he has not "become" eligible for benefits but rather "is" and always has been so eligible (*see id.* at 34-35 n.33).[13]

Instead of analyzing the definition of "participant" or its use in ERISA, Bruch and his amici baldly assert that the disclosure provisions of the statute demonstrate the congressional intent that the term be "read broadly." (Bruch Brief at 41; *see also* DOL Brief at 26-27; AARP Brief at 16; PRC Brief at 18) However, the disclosure provisions are written to apply only to "participants" and "beneficiaries" (*see* 29 U.S.C. §§ 1021-1025), and the very excerpts from the major reports on ERISA quoted by Bruch[14] speak of the intent to provide information to these two classes of individuals—not to "claimants" (*see* Bruch Brief at 41).[15] Thus, the disclosure provisions

12. Contrary to Bruch's suggestion (*see* Bruch Brief at 35, 36; *see also* DOL Brief at 7; AARP Brief at 14), no court has found that Firestone failed to furnish any individual plaintiff with information he requested. The district court held only that Firestone was not required to respond to the requests because the plaintiffs were not "participants" (*see* A71-A72), and the court of appeals did no more than reverse this holding and remand the section 502(c) claims for further proceedings in the district court (*see* A41-A43).

13. The Department of Labor is plainly wrong in stating that Firestone "endorses" the view of the Fifth Circuit that the phrase "may become eligible" in ERISA's definition of "participant" refers only to current employees. (*See* DOL Brief at 24 n.23; *compare* Firestone Brief at 34-36) Bruch's analysis of Fifth Circuit law (*see* Bruch Brief at 44 n.33) is therefore beside the point. It also is misleading. *Compare Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), *with* the later *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

14. While two of the four statements quoted by Bruch (those of Representatives Erlenborn and Biaggi) do not explicitly refer to "participants" (*see* Bruch Brief at 42-43), these isolated remarks, even if they supported Bruch's view, are of no sigificance given the numerous contrary expressions of congressional intent in the statutory language and accompanying reports. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

15. The Department of Labor has omitted the references to "partici-

of ERISA do not support an expansive interpretation of the term "participant."

Bruch attempts to derive further support for a broad reading of the term "participant" from section 503 of ERISA, which requires that "any participant . . . whose claim for benefits under [a] plan has been denied" be informed of the reasons for the denial and given an opportunity for review of the decision by the named fiduciary. 29 U.S.C. § 1133. (*See* Bruch Brief at 40) The references to a participant "whose claim for benefits . . . has been denied," however, speak of a preliminary denial, subject to further review by the named fiduciary of the plan. Section 503 does not address Bruch's contention that mere claimants are *ipso facto* participants.[16]

In fact, section 503 establishes, contrary to the position of Bruch's amici (*see* AARP Brief at 16; DOL Brief at 25, 27; PRC Brief at 22-23), that named fiduciaries are to determine employees' rights to benefits (subject to judicial review). This Court has held that ERISA's disclosure requirements similarly give plan administrators the responsibility to determine "who is in fact a plan participant." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. at 572.[17] Obviously, plan administrators and fiduciaries are to determine who is a participant or beneficiary by looking to the terms of the plan, not by identifying those individuals who claim to be entitled to benefits.

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pants" in its quotations from the legislative history of ERISA. (*Compare* DOL Brief at 26-27 *with* Bruch Brief at 41)

16. Of course, most employees or former employees claiming benefits are or may become entitled to other benefits under the plan and thus remain participants regardless of how their pending claim is ultimately resolved.

17. This responsibility is derived from "the fundamental common-law duties of a trustee . . . to 'investigate the identity of the beneficiary when the trust documents do not clearly fix such party' and to 'notify the beneficiaries under the trust of the gifts made to them.'" *Id.*, *quoting* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 583 at 346, 348-49 n.40 (2d rev. ed. 1980).

B. There Is No Basis in ERISA for Distinguishing Between "Participants" and "Participants Covered Under the Plan."

Bruch and his amici attempt to justify their overexpansive interpretation of the term "participant" by asserting that a plan administrator will be obliged to disclose information to the broad group of "participants," which includes virtually all employees and former employees, only upon request. The detailed information that the administrator must disclose automatically and on a regular basis is alleged to be due only to a narrower group of "participants covered under the plan." (*See* Bruch Brief at 36-37; DOL Brief at 27-29; PRC Brief at 18, 21) The purported distinction between a "participant" and a "participant covered under the plan," while creative, is totally unsupported by the language and history of ERISA.

A "participant" obviously participates *in* something—in this case, an employee benefit plan. To say that a participant is "covered under" a plan is a way of describing in a passive way his participation "in" a plan. Thus, no plain meaning can be given to the concept of a participant *not* "covered under the plan."[18]

Bruch and his amici base their argument on a solitary reference in ERISA to a "participant covered under the plan." This reference appears in section 101(a), 29 U.S.C. § 1021(a), which states the administrator's general disclosure obligations and refers to other provisions to explain exactly *what* must be disclosed and *how* that material must be disclosed and reported.[19] Section 101(a) refers to section 104(b), *id.* § 1024(b),

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18. Since section 3(7) of ERISA defines the term "participant" to include an employee or former employee who is or may become eligible to receive a benefit from a plan "which covers employees" of his employer, 29 U.S.C. § 1002(7), all participants are "covered under the plan" from which they are or may become eligible to receive benefits.

19. Section 101(a), which is quoted in the Bruch Brief at 1a, sets forth the administrator's obligation to furnish "in accordance with" section 104(b), 29 U.S.C. § 1024(b), certain items and information "described in"

as governing the method of disclosure.[20] Because section 104(b) contains two non-automatic disclosure obligations, Bruch is simply incorrect in asserting that section 101(a) "states the general rule with respect to automatic disclosure." (*See* Bruch Brief at 36; *see also* DOL Brief at 28)[21]

The clearest refutation of Bruch's position is the language of section 104(b), which not only does not refer to "participants covered under the plan" but also does not differentiate between the recipients of automatic disclosures and disclosures upon request.[22] If Congress intended to make such a distinction, surely the specific provision of ERISA governing disclosure would indicate this fact.

Bruch and the Department of Labor fare no better in maintaining that the legislative history of ERISA reflects a

sections 102(a)(1), 104(b)(3), and 105(a) and (c), *id.* §§ 1022(a)(1), 1024(b)(3), and 1025(a) and (c).

Section 101(b), 29 U.S.C. § 1021(b), sets forth the administrator's obligation to file "in accordance with" section 104(a), *id.* § 1024(a), various documents with the Secretary of Labor that are "described," "required," or "referred to" elsewhere in the statute.

20. The specific provisions explaining what is to be disclosed and reported as generally set forth in section 101 also refer to section 104(b) as governing the method of disclosure. *See* sections 102(a)(1) and 103(a)(1)(A), 29 U.S.C. §§ 1022(a)(1) and § 1023(a)(1)(A).

21. Even the provisions referred to in subsections (1) and (2) of section 101(a) do not maintain a bright line between automatic disclosures and disclosures upon request. As one of Bruch's amici recognizes (*see* AARP Brief at 18 n.20), subsection (2) refers, *inter alia*, to the individualized benefit statement described in section 105(a), 29 U.S.C. § 1025(a), which under that provision is available only upon request. Moreover, subsection (1) refers only to the summary plan description described in section 102(a)(1), *id.* § 1022(a)(1), and not to the material modifications and changes described in section 102(a)(1) that under section 104(b)(1) must also be disclosed automatically.

22. Section 104(b), entitled "Publication of summary plan description and annual report to participants and beneficiaries of plan," states that publication "shall be made to participants and beneficiaries of the particular plan as follows" and goes on to make the four disclosure obligations that follow (only two of which are automatic) run to "each" or "any" participant without regard to whether he is "covered under the plan."

congressional intent to broaden the group of people to whom a plan administrator's disclosure obligations ran under WPPDA. (*See* Bruch Brief at 41-42; DOL Brief at 26 & n.25) They never even argue that WPPDA's disclosure requirements applied only to a subclass of participants that could have been broadened. Moreover, their main contention, that ERISA did broaden this subclass to include all participants, is based on a mischaracterization of the small wording changes that were made from WPPDA to ERISA.[23]

In fact, the changes suggest that the phrase "covered under the plan" upon which Bruch and his amici place so much weight, like many other phrases that appear in WPPDA and ERISA, is merely intended to clarify that an administrator's disclosure obligations run only to participants in the specific plan he is administering.[24] These minor (and unexplained) modifications certainly provide no basis for finding a congressional intent to apply the new automatic disclosure requirements added in ERISA to a smaller group than the non-automatic disclosure requirements retained from WPPDA.

23. Section 5(a) of WPPDA, the predecessor of section 101(a) of ERISA, set forth the plan administrator's obligation to publish "in accordance with section 8" a plan description and annual report "to each participant or beneficiary covered thereunder." 29 U.S.C. § 304(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). Section 8(a) of WPPDA, the predecessor of section 104(b) of ERISA, provided that publication was to be made "to the participants and to the beneficiaries covered by the particular plan." 29 U.S.C. § 307(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). The phrase "covered thereunder" in section 5(a) of WPPDA became "covered under the plan" in section 101(a) of ERISA (*see* 29 U.S.C. § 1021(a)), and the phrase "covered by the particular plan" in section 8(a) of WPPDA became "of the particular plan" in section 104(b) of ERISA (*see id.* § 1024(b)).

24. Section 9(a) of WPPDA, the predecessor of section 502(c) of ERISA, permitted a damage award if a plan administrator failed or refused to disclose documents to "a participant or beneficiary covered by such plan." 29 U.S.C. § 308(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). The fact that the phrase "covered by such plan" does not appear in section 502(c) (*see* 29 U.S.C. § 1132(c)) is of no significance not only for the reasons stated in text, but because this provision is merely a means of enforcing substantive rights defined elsewhere in the statute.

Bruch is incorrect in intimating that Congress found WPPDA's disclosure provisions "inadequate" with respect to the size of the group to whom disclosure was to be made. (*See* Bruch Brief at 41; *see also* DOL Brief at 26 & n.25) The major reports on ERISA explicitly stated that what was "insufficient" under WPPDA was "the limited data available," and changes were made "to increase the information and data required in the reports both in scope and detail."[25] Significantly, when the Conference Committee described the disclosure obligations of ERISA, it noted their applicability to "each participant" and to "participants" interchangeably for automatic and non-automatic disclosures.[26] Indeed, there is not a single reference in the legislative history that indicates any congressional understanding of a distinction between "participants" and "participants covered under the plan" as affecting the statutory distinction between automatic disclosures and disclosures upon request.

Despite the lack of support for these distinctions in either the language or history of the statute, the Department of Labor has promulgated a regulation, 29 C.F.R. § 2510.3-3(d)(2), which defines the term "participant covered under the plan" in a way that it admits does not cover the respondents in this case. (*See* DOL Brief at 28-29) Bruch and the Department ask this Court to defer to the explanatory preamble to the regulation, which notes that it was intended to limit the burden of ERISA's automatic disclosure obligations and states that disclosures upon request are due to any "participant," a term which the preamble does not define but which it construes to include "many individuals whose interest in an employee

25. H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4648, *and in* 2 *Legislative History* 2348, 2358; S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863, *and in* 1 *Legislative History* 587, 613.

26. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 258-59 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5041, *and in* 3 *Legislative History* 4277, 4525-26.

benefit plan is minimal." 40 Fed. Reg. 24,642, 24,649 (1975). (*See* Bruch Brief at 39; DOL Brief at 29)[27]

No deference is due to vague discussions in a regulatory preamble that fail to "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *see K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 556 (1979). Even if ERISA were arguably ambiguous, its language and history so firmly support the conclusion that respondents were not "participants" when they requested information that the preamble has no "power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). Under any analysis, therefore, this Court should not defer to the Department's view.

27. Interestingly, the Department defined "participant" in 29 C.F.R. § 2610.2 without hinting at the expansive interpretation it now urges.

CONCLUSION

For the reasons detailed above and in Firestone's opening brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to reinstate the decision of the district court on the two questions presented.

Respectfully submitted,

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